

(b)(6)



U.S. Citizenship
and Immigration
Services

Date: MAR 20 2013 Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
[REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision will be withdrawn and the matter will be remanded to the director for further consideration.

The petitioner is a software development and computer consultancy business. It seeks to employ the beneficiary permanently in the United States as a senior analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the labor certification required at a minimum a bachelor's degree and five years of progressive post-baccalaureate experience. The director further determined that the petitioner submitted evidence to establish that the beneficiary was awarded a bachelor's degree foreign equivalent but that the petitioner failed to demonstrate that the beneficiary meets the experience requirements of the position.

On appeal, counsel asserts that the beneficiary meets the minimum experience required for the position.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner has submitted evidence to show that the beneficiary possesses the foreign equivalent of a bachelor's degree in engineering as of June 1995. The petitioner has also submitted employment letters pertaining to the beneficiary's work experience. The issue in this case is whether the beneficiary's degree and work experience constitute a U.S. advanced degree or a foreign degree equivalent and which complies with the terms of the ETA Form 9089.

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

In this matter, Part H, line 4, of the labor certification reflects that a master's degree is required. The labor certification at Parts H, line 6; and H, line 10, also reflect that 6 months of experience in the duties of the proffered position or 6 months of experience in the IT field is required. As an alternative, the labor certification at Part H, line 8, requires a bachelor's degree in computer science, computer information systems, engineering or math, and five years of progressive post-baccalaureate experience. Part H, line 9 reflects that a foreign educational equivalent is acceptable.

Part H, line 11, of the labor certification reflects the required job duties as:

- Meet with clients to review requirements and business specification for project. Develop methodologies for implementing project to meet business requirements using AIM. Coordinate the design and implementation of project applications using Oracle Apps (Oracle Financials and HRMS), Oracle tools, Discoverer, Developer, Ascendant, Toad, Shell, PL/SQL, SQL and Perl Script. Determine appropriateness of application solutions. Review and oversee implementation of test methodologies. Track defects using Quality Center. Coordinate the migration of the completed work and implementation on production. Review technical requirement and business requirement documentation using Oracle Forms and Reports. Mentor and assist junior analysts with the implementation and debugging problems.

Part H, line 14, of the labor certification reflects the required specific skills or other requirements, in part, as:

- Experience with Oracle Apps (Oracle Financials and HRMS), Shell, SQL, Perl Script, Quality Center, and Oracle Forms and Reports.
- Employer accepts any suitable combination of education, training or experience for offered position.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the

section of the labor certification eliciting information of the beneficiary's work experience, he represented the following:

- That he was employed by [REDACTED] as a "senior Oracle DBA/APP DBA Co" from October 3, 2009 to July 16, 2011.
- That he was employed by [REDACTED] (the petitioner) as a "programmer analyst" from February 17, 2007 to September 30, 2009.
- That he was employed by [REDACTED] as an "Oracle Database Administrator" from September 4, 2006 to January 30, 2007.
- That he was employed by [REDACTED] as an "Oracle Database Administrator" from February 15, 2006 to August 30, 2006.
- That he was employed by [REDACTED] as an "Oracle Database Administrator" from June 15, 2005 to January 30, 2006.
- That he was employed by [REDACTED] as an "Oracle Database Administrator" from March 1, 2004 to May 30, 2005.
- That he was employed by [REDACTED] as a "Database Administrator" from December 2, 2002 to February 28, 2004.
- That he was employed by [REDACTED] as a "Software Programmer" from April 5, 1999 to July 18, 2001.

The petitioner submitted the following evidence:

- A letter from [REDACTED] who stated that the company employed the beneficiary from December 2002 to February 2004 as a database administrator, and as an art director in June 2003. The declarant failed to describe the beneficiary's job duties.
- A letter dated May 10, 2005 from [REDACTED] who stated that the company employed the beneficiary as an Oracle Database Administrator from March 2004 to May 2005. The declarant further stated that the beneficiary was assigned the tasks of performance tuning, database replication using advance replication API, and backup and recovery using recover manager (RMan). The duties are vaguely described and do not clearly correspond with the job description provided on the labor certification.

- A letter dated March 29, 2006 from [REDACTED] who stated that the company employed the beneficiary as an Oracle Database Administrator from June 15, 2005 to January 2006. The declarant also indicated that the beneficiary's responsibilities included: understanding the business needs and requirements, enhancement of agency networks, programming in PL/SQL and administrating of database servers, debugging and fixing the errors, closely working with project leads to understand the needs, involved in database designing of "my Declare web portal," and worked as a team member.
- A letter dated October 25, 2011 from the [REDACTED] who stated that the company employed the beneficiary from February 2007 to September 2009 as a "programmer analyst." It is noted that the duties described by the [REDACTED] in this letter are the same as those described in the labor certification although the job titles are dissimilar. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested," the petitioner answered "no." In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable¹ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicated in response to question K.1. that his position with the petitioner was as a programmer analyst, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.
- A letter dated September 19, 2011 from [REDACTED] who stated that the company employed the beneficiary as a systems

¹ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- ...
 - (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

analyst from November 16, 2009 to August 31, 2011. His duties were specifically described.²

In response to the director's Notice of Intent to Deny, the petitioner submitted the following evidence:

- A letter dated January 12, 2012 from [REDACTED] who stated that the company employed the beneficiary from April 5, 1999 to July 18, 2001 as a software programmer. The declarant further stated that the beneficiary programmed applications in Java technologies and Microsoft technologies using VB; provided DBA support for the company, including migrating applications using Oracle, backup and recovery, tuning and enhancing the company's Oracle environment; converted Pro*C programs from Cobol; and developed the company's coding standards.
- A letter dated January 17, 2012 from [REDACTED] who stated that he was the beneficiary's supervisor. He further stated that the company employed the beneficiary from December 2, 2002 to May 30, 2003 as a database administrator; and from June 1, 2003 to February 2004 the company employed the beneficiary as an art director. The declarant described the beneficiary's duties as a database administrator and as an art director.
- A letter dated January 17, 2012 from [REDACTED] who stated that the company employed the beneficiary from March 1, 2004 to May 30, 2005 as an Oracle database administrator. The declarant further stated that the beneficiary's job duties included: upgrading and migrating Oracle software projects; completing logical and physical data modeling and scripts development using Erwin, and installing and configuring Oracle databases.
- A letter dated January 9, 2012 from [REDACTED] who stated that the company employed the beneficiary from February 15, 2006 to August 30, 2006 as an Oracle database administrator. The declarant also stated that the beneficiary installed and upgraded different versions of Oracle, installed SQL Server; converted Oracle to SQL Server; wrote procedures for applications and monitored database activities; and completed

² Although the director considered discrepancies in the end date of this employment experience to undermine the credibility of the experience letters, it appears more likely than not that the end date in the ETA Form 9089 (July 16, 2011) was entered because this was the date the ETA Form 9089 was filed. The later dates in the letters demonstrate that this experience continued beyond the priority date. The discrepancy has been resolved, and the evidence will be considered. The similarity of the job description in the letter to the ETA Form 9089 also does not undermine the credibility of this evidence in this particular matter.

Oracle database administration, maintenance and troubleshooting; and migrated DB2/400 database to Oracle for data warehouse project.

Based on a review of all the experience letters in the record, the AAO has concluded that it is more likely than not that the beneficiary had at least five years of progressive experience after the issuance of his bachelor's degree in 1995 and before the July 16, 2011 priority date. His experience with [REDACTED] (April 1999 to July 2001); [REDACTED] (December 2002 to February 2004); [REDACTED] (June 2005 to January 2006); [REDACTED] (March 2004 to May 2005); and [REDACTED] (February 2006 to August 2006), was adequately described and documented and, when considered together, exceed 60 months of progressive experience. The petitioner also resolved the inconsistency surrounding the beneficiary's employment with [REDACTED] even though this experience need not be considered given his other documented work experience.

Accordingly, it has been established that the beneficiary has the requisite five (5) years of progressive post-baccalaureate experience. 8 C.F.R § 204.5(g)(1).

The petition, however, cannot be approved at this time. USCIS records show that the petitioner has filed other immigrant petitions; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore, the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for the issuance of a new, detailed decision.